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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 933

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Introduction

Appellant appeals from the judgment of the New York Court of Appeals made January 10, 1957 and entered January 16, 1957 denying Appellant's motion based upon the mandate and opinion of the Court in the prior appeal herein (351 U. S. 141). On such prior appeal this Court reversed the determination of the Court of Appeals reported in 308 N. Y. 798 and 941 and remanded the cause for proceedings not inconsistent with its opinion.

The judgment of the Court of Appeals now being appealed, adhered to that Court's original determina-

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tion, refused to reverse, and reaffirmed the dispositions made by the Appellate Division and County Court which had denied the relief to Appellant.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

Subsequent to the issuance of the mandate of this Court on June 12, 1956, addressed to the New York Court of Appeals, Appellant moved for an amendment of the remittitur or, in the alternative, for reargument. On July 11, 1956 amendment of the remittitur was denied, but reargument was granted. No opinion was rendered with respect to such dispositions.

Oral reargument was had before the Court of Appeals on October 19, 1956. The opinion of the Court of Appeals, issued January 10, 1957, on which its judgment and final order is based and from which this appeal is taken, is reported in 2 N. Y. (2d) 250. A copy is attached as Appendix "A".

Jurisdiction

(i) Pursuant to Article VII-A, Title 3 of the New York Tax Law, the Town of Somers proceeded to foreclose its tax lien on the Incompetent's property and thereafter acquired title thereto by reason of the Incompetent's failure to interpose an answer. After

the appointment of Appellant, as Committee, he made application to open the default, to set aside the deed as an unlawful taking of property and repugnant to the provisions of the Fourteenth Amendment of the United States Constitution.

(ii) The County Court denied the motion. This was affirmed by the Appellate Division of the New York Supreme Court, and by the New York Court of Appeals. On appeal to this Court, probable jurisdiction was noted on November 7, 1955 in 350 U. S. 882.

(iii) On June 12, 1956, this Court issued its mandate reversing the judgment of the New York Court of Appeals and remanded the cause for proceedings not inconsistent with the Court's opinion, rendered by Mr. Chief Justice Warren on May 7, 1956.

(iv) Armed with such mandate and opinion, Appellant made application to the New York Court of Appeals to vacate the judgment of foreclosure, set aside the deed, and set aside the process and proceedings in so far as they applied to the Incompetent's property. On January 10, 1957, the State Court adhered to its original determination, reaffirming the disposition made by the Appellate Division and County Court; all this, despite the reversal by this Court. The judgment and final order appealed from is in the form of the re-amended remittitur made January 10th, 1957 and entered January 16th, 1957.

(v) The notice of appeal herein having been served on March 25th, 1957 and filed with the Clerk of Westchester County on March 26th, 1957, the within appeal is timely.

(vi) The jurisdiction of the Supreme Court to review the determination of the New York Court of Appeals by direct appeal is conferred by Title 28 U. S. C. Section 1257(2).

(vii) The following decisions sustain the jurisdiction of the Supreme Court to review the order on direct appeal in this case:

Martin v. *Hunter's Lessee*, 1 Wheat. 304;
Williams v. *Bruffy*, 96 U. S. 176;
Stanley v. *Schalby*, 162 U. S. 255;
In Re Blake, 175 U. S. 114;
Georgia Ry. & Electric Co. v. *The City of Decatur*, 397 U. S. 620.

See also: Robertson and Kirkham, Jurisdiction of the Supreme Court of The United States (1951 Edition), Section 12.

Questions Presented

1. Whether the denial by the New York Court of Appeals of Appellant's motion, which was made pursuant to the May 7, 1956 opinion and the mandate of this Court issued June 12, 1956, is inconsistent with said opinion and mandate.

2. Whether the State Court's adherence to its original determination and its reaffirmance of the order of the Appellate Division and County Court, despite the reversal thereof by this Court, constitute proceedings not inconsistent with the opinion and mandate of this Court.

3. Whether the failure and refusal of the New York Court of Appeals to follow the mandate and opinion of this Court, constitutes a denial of a federal right and again results in a deprivation of property without due process and denies the Incompetent and Appellant equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. Whether the failure and refusal of the Court of Appeals to abide by the mandate and opinion of this Court warrants the award by this Court of judgment for the Appellant for the relief requested without any further proceedings before the State Court.

Statement of the Case

The opinion of this Court, reported in 351 U. S. 141, and reprinted herein as Appendix "B", sets forth the facts and proceedings which resulted in the mandate issued June 12, 1956. We shall not burden the Court with a reiteration of those facts here, especially since the Court of Appeals also recognized that those facts must be deemed admitted on this record. Nevertheless, we take the liberty of briefly summarizing this Court's ruling:—

1. A constitutional question properly had been raised in the Court below and necessarily decided by it.

2. Due process requires notice reasonably calculated under all the circumstances to apprise the interested party of the pendency of the action and afford him the opportunity to present his objections.

3. When notice is due or required, process which is a mere gesture is not due process.

4. Notice to a person known to be incompetent, who is without the protection of a guardian, does not measure up to this requirement.

5. Since Nora Brainard was unable to understand the nature of the proceedings against her property, unable to avail herself of the procedure for redemption or answer, and the Town knew her to be an unprotected Incompetent, compliance with the Statute would not and did not afford notice to her, and the taking of her property under these circumstances was without due process of law. The opinion of this Court then concludes with:

> "The question was appropriately raised and the issue improperly decided against the Appellant. The judgment must, therefore, be reversed, and the cause remanded for proceedings not inconsistent with this opinion."

How the Federal Question Is Presented:—

Armed with the mandate and opinion of this Court, Appellant then made application to the Court of Appeals on July 3, 1956:—

(a) to amend the remittitur so as to comply with the mandate of this Court;

(b) to vacate the judgment of foreclosure in so far as it applied to the property of the Incompetent;

(c) to set aside and void the deed to such property delivered to the Town;

(d) to vacate and set aside the process and pro-

ceedings in so far as they are applicable to the Incompetent and her property, because due notice was not afforded;

(e) to vacate and discharge the tax liens upon re-tender by the Appellant of the amount with interest computed to September 22, 1953, which is the date of the original tender.

(f) to award the Appellant a judgment against the Town for costs and disbursements in this Court, in the Court of Appeals, Appellate Division and the County Court; and

(g) to grant to Appellant such other and further relief as may be warranted;

OR, IN THE ALTERNATIVE

that leave be granted to reargue so that all of the relief above requested may be granted.

On July 11, 1956, the Court of Appeals denied amendment of the remittitur and granted reargument. No opinion was rendered. After submission of briefs, on October 19, 1956, oral argument was had before the Court of Appeals on behalf of the Appellant, Appellee and also by the Attorney General of the State of New York, who again appeared and argued in support of the Appellee-Town's position. On January 10, 1957, the Court of Appeals reaffirmed its previous determination despite this Court's mandate to reverse.

Such reaffirmance and the denial of Appellant's application for the relief as requested is inconsistent with the opinion and mandate of this Court. It results in lending legal sanction to the taking of the Incompetent's property, which this Court has held on this

record to be a deprivation of property without due process. This is the result, despite the fact that there had been no change in the facts or circumstances set forth in the original record.

Present Status of the Property:—

Pursuant to an order granted by the New York Court of Appeals, the Town was stayed from proceeding with the sale of the property. By subsequent stipulation of the parties, this stay has been extended pending the review and determination of this cause by this Court.

The Questions are Substantial

It is respectfully submitted that the questions herein presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

The course for the State Court to have taken was to grant the relief demanded by Appellant. Only such relief is consistent with this Court's ruling. Its denial and the adhering by the State Court to its original determination was inconsistent with and directly in conflict with the opinion and mandate of this Court. Such action constitutes a denial of a federal right. (See: 55 Harvard Law Review, 1357 at 1363)

This Court's opinion of May 7, 1956 did not leave open any issues for the Court of Appeals to decide. Indeed, its decision was directly determinative of the issues sought to be taken up again by the Court of

Appeals. No new issues were presented nor could any new issues be passed upon by the State Court. It had merely to implement the decision of this Court by taking the steps necessary to carry it out.

In view of the amended remittitur and the record, the ruling and intent of the State Court was clear. The present opinion and ruling of that Court from which this appeal is taken, is not only in direct conflict with, but nothing more than an attempted circumvention of the opinion and mandate of this Court. This Court had restored to Appellant a substantial right. The State Court has now denied him that right. The action of the State Court again sanctions the taking by the Town of the Incompetent's property, which this Court has held on this record to be a deprivation of property without due process. (*Covey* v. *Town of Somers,* 351 U. S. 141)

To permit the present situation to exist leaves Appellant in a state of frustration. He finds himself, after a favorable determination by this Court, with a mandate to the State Court to take steps necessary to implement that determination, relegated to the same status in which he had been prior to the original appeal to this Court. This is the result of a ruling directly contrary to this Court's determination. This follows even though the supremacy of the mandates of this Court over that of State Courts was established at an early date in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304.

For this Court to sanction a practice as was indulged in here by the New York Court of Appeals, in effect, tends to invalidate the entire theory and prac-

tice of appellate jurisdiction. "The layman expects that an adjudication of a party's rights by the United States Supreme Court is determinative, and loss of respect follows naturally if its mandates are evaded or if litigation is again prolonged." (See: State Court Evasion of United States Supreme Court Mandates, 56 Yale Law Journal 574, at P. 580.)

For this Court to rule that a taking of property was without due process of law and then see a State Court defy its mandate and sanction the taking regardless, is to introduce judicial anarchy where there should be judicial order, and to relegate constitutional safeguards to an ephemeral judicial limbo.

For the foregoing reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

TOWN OF SOMERS,

Respondent,

v.

EDWIN B. COVEY, as Committee of the Person and Property of Nora Brainard, an Incompetent,

Appellant.

2 N. Y. 2d 250

Court of Appeals of New York.
Jan. 10, 1957.

Samuel M. Sprafkin, Adolph I. King and Mandel M. Einhorn, New York City, for appellant.

Harry H. Chambers and Otto E. Koegel, New York City, for respondent.

Jacob K. Javits, Atty. Gen. (John R. Davison and James O. Moore, Jr., Albany, of counsel), in his statutory capacity under section 71 of the Executive Law, Consol. Laws, c. 18.

CONWAY, Chief Judge.

The decision of this court in *Town of Somers* v. *Covey* (308 N. Y. 798), affirming an order of the Appellate Division in favor of the Town of Somers and answering the certified question in the affirmative, has been reversed by the Supreme Court of the United States, and the case has been remanded

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to this court "for proceedings not inconsistent with this opinion." *Covey* v. *Town of Somers,* 351 U. S. 141, 147, 76 S. Ct. 724, 727, 100 L. Ed. 1021. On the basis of such reversal and remand, the petitioner-appellant Covey, committee of the person and property of Nora Brainard, an incompetent, now seeks, in substance, an order which would vacate the default judgment of foreclosure against the incompetent and set aside and void the deed which conveyed certain of her real property to the town because she was delinquent in the payment of her taxes. Adjudication of the motion requires a re-examination of the facts of the case, the rationale of our decision and the extent to which it has been affected by the action of the Supreme Court.

On May 8, 1952 the respondent town commenced an action under title 3 of article VII-A of the Tax Law, Consol. Laws, c. 60, which provides, in section 165 et seq., for the judicial foreclosure of tax liens on real property. The action with which we are concerned involved the foreclosure of liens for tax arrears unpaid for more than four years prior thereto with respect to a number of properties in the Town of Somers, including the property which is the subject of this case. Under the provisions of section 165-a of the Tax Law the filing at the county clerk's office of a list of all parcels of property affected by tax liens which have been unpaid for a period of at least four years constitutes the filing of a notice of *lis pendens* and of a complaint, and commences an action against the property. Provision is made in section 165-b for notice by publication, by posting and by mailing. The

prescribed notice is to the effect that, unless the amount of unpaid tax lien, together with interest and penalties is paid within seven weeks, or an answer interposed within 20 days after the last day for redemption, any person having the right to redeem or answer shall be forever foreclosed of all his right, title and interest and equity of redemption in and to the affected property. The statute provides in section 165-h thereof for the entry of a judgment of foreclosure awarding possession of the property to the tax district and directing execution of a deed by the collecting officer of the tax district conveying an estate in fee simple absolute to the district.

The respondent town complied with the provisions of the statute. Simultaneously with the institution of the action in May of 1952, publication was commenced by notice of foreclosure in the Westchester Post and The Record, newspapers serving an area including the Town of Somers. In addition, notice of commencement of the action was given to Nora Brainard by mailing and posting. Nora Brainard did not redeem her property or interpose an answer. Four months after the commencement of the action, and on September 8, 1952, judgment of foreclosure was entered with respect to all owners who had failed to redeem their properties within the time permitted by the statute. On October 24, 1952 a deed to the property owned by Nora Brainard was delivered to the Town of Somers and recorded in the office of the clerk of Westchester County. Similar conveyances were made and recorded in the cases of the other unredeemed properties.

Thereafter, on November 6, 1952, Nora Brainard

was admitted to the Harlem Valley Hospital as a person of unsound mind. On February 13, 1953 the appellant was appointed and qualified as a committee of the incompetent. It must be assumed on the state of the record that Nora Brainard was a known incompetent, to the town itself, for a period of years before her commitment to the institution.

On October 26, 1953, just one year from the time the deed had been delivered to the town and recorded, the committee *made a motion* in the County Court of Westchester County to vacate the default, to set aside the deed to the respondent town and to allow the incompetent to answer or appear or otherwise move with respect to the "Notice of Foreclosure of Tax Liens by the Town of Somers. In Rem". On December 3, 1953, the County Court denied the motion. In its opinion the County Court first set forth the contention of the committee as follows: "* * * It is contended that the default of said Nora Brainard was excusable since she was a known incompetent at the time that proceedings were instituted and that by reason of her mental incapacity she did not know the nature of the proceeding and that the Court was not apprised of her condition and no one was appointed to act in her behalf. It is further contended that section 165-a of the Tax Law with respect to incompetents is unconstitutional in that the manner of giving notice to an incompetent is inadequate. * * *" (Emphasis supplied.)

After so stating the committee's contention the County Court declared, in part: "In the first instance it should be pointed out that the procedure adopted by the applicant is improper. Subdivision 7, section

165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceedings were regular and in accordance with the provisions of law relating thereto, and further provides 'No action to set aside such deeds may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *'. In the case at bar no action to set aside the deed has been commenced and no lis pendens has been filed although the time that the presumption becomes conclusive has not expired. * * *" (Emphasis supplied.)

Thus did the court of first instance point out to the committee that where the owner of a parcel of realty included in the list filed with the county clerk pursuant to section 165-a of the Tax Law has failed to redeem or answer within the prescribed time, and the deed has been delivered to the tax district, *a motion to open the default* is not available and that the deed may be set aside only in *an action* brought for that purpose. The County Court did not reject, on the merits, the committee's contention that the notice given to the incompetent was inadequate to afford her due process of law.

The decision of the County Court was handed down more than ten months prior to the time when the presumption of regularity of the foreclosure proceedings would become conclusive and be not subject to attack by an action to set aside the deed. See Tax Law, § 165-h, subd. 7.

In affirming the determination of the County Court

the Appellate Division made clear to the committee the reason why *a motion to open the default* was not available to him. That court said: "Upon the expiration of the time prescribed by the statute, Tax Law, § 165 et seq., *for redemption and answer,* the rights of the parties, in view of the provisions of section 165-a of the Tax Law, became fixed and unalterable. The latter section is in the nature of a statute of limitations and precludes the court from extending the time to answer or redeem therein prescribed." 283 App. Div. 883, 129 N. Y. S. 2d 537, 538; emphasis supplied.

The Appellate Division, like the County Court, did not reject, on the merits, the committee's contention that the notice given to the incompetent was inadequate to afford her due process of law.

The decision of the Appellate Division was handed down more than six months prior to the time when the presumption of regularity of the foreclosure proceedings would become conclusive and be not subject to attack by an action to set aside the deed.

Instead of accepting the determination of the County Court and the Appellate Division by instituting an action to set aside the deed, as he had been told was the proper procedure to obtain a hearing upon the merits, the committee appealed to our court. The case came on to be heard by our court in January of 1955, two years and three months after the deed had been delivered to the town. We unanimously affirmed, without opinion. In our confidential report on the case we made note of the fact that the committee failed to make any mention in his brief with respect to whether the procedure adopted by him was proper

or not; that he assailed the determination below upon the ground that the conduct of the town was oppressive and unconscionable; that he contended that equity would require that the judgment in the previous action be set aside, and that the statute insofar as it applied to the incompetent be declared to be unconstitutional. We concluded that such arguments were not available to the committee for, assuming them to be correct, he had failed to proceed properly. Accordingly, we never reached the merits of the committee's arguments.

Following our affirmance of the order of the Appellate Division the committee moved for reargument or, in the alternative, for an order amending the remittitur to recite that "* * * this Court on this appeal, considered and passed upon the constitutional questions of (a) due process, (b) separation of powers of Government and (c) equal protection of the laws, thus enabling Petitioner-Appellant to petition for a Writ of Certiorari to the United States Supreme Court".

We feel that we would have been completely justified in denying the committee's motion for such an amendment, since at no stage of the proceedings had the merits of the committee's arguments been reached or ruled upon. No court in this State has ruled that the notice prescribed by section 165-a and section 165-b of the Tax Law is sufficient to satisfy the demands of due process in the case of a known incompetent and the Supreme Court has said that no court in this State could properly so rule. However, at the time of the motion to amend the remittitur, we viewed the matter in the light most favorable to the

committee. It was possible to argue that the committee was contending that the time limitation to redeem or answer, insofar as it applied to known incompetents, was unconstitutional. That being so, we felt impelled to grant the motion to recite that "on this record" we found no "deprivation of due process" or of "equal protection of the laws", by which we meant merely that a State may properly impose a time limit in which to answer or redeem and that such does not constitute a violation of the Fourteenth Amendment in a case such as this where (1) the incompetent has been given a period of two years after the recording of the deed in which to bring *an action to set it aside,* (2) a committee had been appointed 20 months before the expiration of such period, and (3) the committee had been advised, still well before the expiration of said two-year period, by a County Court opinion that *an action to set aside the deed* and *not a motion to vacate the default* is the proper remedy. See *Saranac Land & Timber Co.* v. *Comptroller of New York,* 177 U. S. 318, 330, 20 S. Ct. 642, 44 L. Ed. 786 and cases cited therein; *Terry* v. *Anderson,* 95 U. S. 628, 24 L. Ed. 365. We realize now that our amendment of the remittitur was subject to more than one interpretation and that we did not make clear in that amendment the precise ground of our decision. Had we done so, we believe that the Supreme Court would not have reversed our determination for that court has written that "* * * no constitutional question could have been reached if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy." [351 U. S. 141, 76 S. Ct. 726.]

We, however, were precisely of that opinion. The basis of the reversal of our determination is to be found in the following words of the Supreme Court: "Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

We do not read the opinion of the Supreme Court as a holding that if an in rem proceeding be brought against a known incompetent who has no committee the default judgment of foreclosure is void and can be attacked at any time after its entry. Were such the case, the state of tax titles and the law of tax foreclosure in New York would be thrown into confusion for lawyers and title companies examining tax titles would never know whether the titles were good or not because they would never know whether some one of the interested parties was a known but unadjudged incompetent. Rather, we read the opinion of the Supreme Court as a holding that where the owner is a known but not adjudged incompetent, the notice prescribed by section 165-a and section 165-b is insufficient to satisfy the demands of due process and that the incompetent must be afforded a method by which

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to set aside the default judgment of foreclosure and a reasonable time within which to avail herself of such method.

Our court has not held that the notice prescribed by section 165-a of the Tax Law is sufficient to satisfy the demands of due process in the case of a known incompetent. Our holding is simply that where the deed has been delivered and recorded, an attack on the sufficiency of the notice may be made *only in an action* under subdivision 7 of section 165-h of the Tax Law. Here, as we have already pointed out, a committee was appointed and was available and able to institute such an action on behalf of the incompetent well within the statutory period prescribed. Historically there are distinct attributes attached to the word "action", and the definition of "action" as opposed to "motion" is made clear by the language of sections 4 and 113 of our Civil Practice Act. The Legislature of the State of New York has seen fit to provide that an action is the method by which a tax deed may be set aside and it may not be presumed to have acted unreasonably in so doing. Therefore, it cannot be argued that the procedure followed by the committee of the incompetent complied with the statutory mandate of subdivision 7 of section 165-h of the Tax Law, which provides that an action may be maintained to set aside the deed within two years.

The case of *City of New York* v. *Nelson,* 309 N. Y. 94, 127 N. E. 2d 827, affirmed 352 U. S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171, in which we granted leave to appeal and subsequently affirmed, cannot be con-

sidered to indicate that the procedure adopted by the committee in the present case, i.e., a motion to open the default in an in rem tax proceeding, was in fact proper. In the present case subdivision 7 of section 165-h of the Tax Law is applicable and provides that an action is the proper remedy, while at the time the application to open the default was made in the *Nelson* case, supra, the applicable sections of the Administrative Code of the City of New York did not so provide. (But see Local Laws, 1955, No. 63 of City of New York, amending the Administrative Code of the City of New York so as to insert therein a provision similar to that of subdivision 7 of section 165-h of the Tax Law.)

For the foregoing reasons, we are constrained, on this reargument, to affirm the order of the Appellate Division.

Upon reargument, the order of the Appellate Division should be affirmed, without costs, and the certified question answered in the affirmative.

DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Upon reargument: Order affirmed. Question certified answered in the affirmative.

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

No. 380.—October Term, 1955.

Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an Incompetent,

Appellant,

v.

Town of Somers.

On Appeal From the Court of Appeals of New York.

May 7, 1956.

Mr. Chief Justice Warren delivered the opinion of the Court.

The application of Article VII-A, Title 3, of the New York Tax Law to the mentally incompetent ward of appellant is challenged as being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The statute, in § 165 *et seq.*, provides for the judicial foreclosure of tax liens on real property. The filing at the county clerk's office of a list of taxes delinquent more than four years constitutes the filing of a notice of *lis pendens* and of a complaint, and commences an action against the property. Provision is made for notice by publication, by posting, and by mailing. The prescribed notice is to the effect that

unless the amount of unpaid tax liens, together with interest and penalties which are a lien against the property, are paid within 7 weeks, or an answer interposed within 20 days thereafter, any person having the right to redeem or answer shall be forever foreclosed of all his right, title, and interest and equity of redemption in and to the delinquent property. Provision is made for entry of a judgment of foreclosure awarding possession of the property to the tax district and directing execution of a deed conveying an estate in fee simple absolute to the district. The provisions of Title 3 purport to be applicable to and valid and effective with respect to all defendants, even though one or more of them be infants, incompetents, absentees, or nonresidents of the State of New York.

Section 165-h(7) makes the deed presumptive evidence of the regularity of the proceedings. After two years this presumption becomes conclusive. The Section further provides that no action to set aside the deed may be maintained unless commenced and a *lis pendens* notice filed prior to the time the presumption becomes conclusive.

We are met at the outset with the contention of appellee and the State of New York, *amicus curiae*, that an action, as distinguished from the motion in the original proceeding here utilized, was the exclusive remedy in this case. The statute itself contains no suggestion that a new action is the exclusive remedy; it merely limits the time within which *an* action may be brought to set aside the deed. The Second Department of the Appellate Division, which decided this case, has recognized the existence of equitable power to entertain a motion to open a default

in an *in rem* tax proceeding.[1] If that were not enough, appellee, on oral argument, conceded that in an action of the sort contemplated by § 165-h(7), the appellant would have been able to attack the deed only on the ground of alleged irregularities in the assessment and foreclosure proceedings. Although the Attorney General of New York has supported a contrary position, it was admitted at the argument that there was no decision to support his view. Our conclusion that the constitutional question was properly raised by appellant's motion is reinforced by the action of the Court of Appeals which amended its remittitur to disclose that a constitutional question was presented and necessarily decided on the appeal to that court. Manifestly, no constitutional question could have been reached, if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy.

This proceeding started on May 8, 1952. The Town of Somers instituted it to foreclose many tax liens, one of which was its lien against the parcel of real property owned by the incompetent. In compliance with the statute, notice was given to the incompetent taxpayer by mail, by posting a notice at the post office, and by publication in two local newspapers. No answer having been filed by the incompetent, judgment of foreclosure was entered on September 8, 1952, and on October 24, 1952, a deed to her property was delivered to the town. Five days later, on October 29, 1952, Nora Brainard was certified by the County Court

[1] *Nelson* v. *City of New York*, 283 App. Div. 722. A subsequent motion to open the default was denied, 284 App. Div. 894. That action was affirmed by the Court of Appeals, 309 N. Y. 94, and the case is pending on appeal to this Court, No. 636, O. T. 1955.

as a person of unsound mind, and one week later, November 6, 1952, she was committed to the Harlem Valley State Hospital for the insane. Thereafter, on February 13, 1953, appellant filed bond pursuant to an order appointing him Committee of the person and property of the incompetent.

Sometime prior to September 22, 1953, the town offered the incompetent's property for sale at a minimum bid price of $6,500. The unpaid taxes, interest, penalties, costs of foreclosure, attorney's fees, and maintenance charges on the property to September 22, 1953, aggregated $480. On that date, appellant's attorney appeared before the Town Board and offered to repay the town the amount due on the property in consideration of its return to the incompetent's estate. The offer was refused.[2]

Appellant then filed a motion in the County Court of Westchester County, where the judgment of foreclosure had been entered, for an order to show cause why the default should not be opened, the judgment vacated and the deed set aside, and permission granted "to answer or appear or otherwise move with respect to" the notice of foreclosure. He alleged in a supporting affidavit that, although Nora Brainard's incompetency was known to the town officials, no guardian was appointed until shortly after the foreclosure. Appellant contended that the notice given to Nora Brainard, although in compliance with the statute, was inadequate in the case of a known incompetent, and, therefore, that the statute as applied was repugnant to the Fourteenth Amendment.

[2] Thereafter the town rescheduled the sale of the property at a minimum bid price of $3,500.

Appendix "B"

The trial court, finding that the incompetent had not been deprived of her constitutional rights and that the statute is valid, denied the motion. The Appellate Division of the Supreme Court, one judge dissenting, affirmed on the ground that the rights of the parties are fixed after expiration of the 7 weeks and 20 days provided for redemption or answer in § 165-a of the tax law. 283 App. Div. 883, 129 N. Y. S. 2d 537. The Court of Appeals, which, as noted before, certified that a question under the Fourteenth Amendment was raised and necessarily decided, likewise affirmed. 308 N. Y. 798, 125 N. E. 2d 862. We noted probable jurisdiction. 350 U. S. 882.

At this stage of the proceedings we are bound, as were the courts below, to assume that the facts are as disclosed by the uncontroverted affidavits filed with appellant's motion for an order to show cause. From these it appears that Nora Brainard was a long-time resident of Town of Somers in the State of New York, and a person of means at all times financially able to meet her obligations, owning four pieces of improved real property in addition to the home property which has been taken by foreclosure. She lived alone, however, and had no relative in the State of New York or any other person present or available to assist her or to act in her behalf in connection with her taxes, despite the fact that she was and for upwards of 15 years had been an incompetent. Although she was known by the officials and citizens of the Town of Somers to be a person without mental capacity to handle her affairs or to understand the meaning of any notices served upon her, no attempt was made to have a committee appointed for her per-

son or property until after entry of the judgment of foreclosure in this proceeding.

Appellee argues that the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-315.

Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law. The

question was appropriately raised and the issue improperly decided against the appellant. The judgment must, therefore, be reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 380.—October Term, 1955.

Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an Incompetent, Appellant,

v.

Town of Somers.

On Appeal From the Court of Appeals of New York.

May 7, 1956.

Mr. Justice Frankfurter.

If the Court of Appeals saw the case as this Court sees it, reversal of its judgment, for the reasons given in the Court's opinion, would be required. My difficulty arises from the fact that this is so clear that I am compelled to wonder whether the New York Court of Appeals whose judges again and again have evinced due regard for due process would, by a summary disposition, sanction such a denial of due proc-

ess. This Court has had frequent occasion to advert to the darkness which confronts us in trying to determine the meaning of state legislation and the scope of state remedies. This is particularly true when we are vouchsafed no light either from the Appellate Division or the Court of Appeals regarding the availability of subdivision 7 of § 165 (h) of the New York Tax Law in a situation, like the present, so obviously calling for relief as a matter of due process. The uncertainties of state law are not removed by conflicting views expressed at the bar of this Court by New York counsel.

Nor is my difficulty dissipated by the amended remittitur of the New York Court of Appeals. It reads as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the petitioner."
>
> 308 N. Y. 798, as amended in 308 N. Y. 941.

To be sure, the Court of Appeals thus held "that there was no denial of any constitutional right of the petitioner." But as that court said, it was only answering the question that was before it, namely, whether "on this record" there was "a deprivation of due process." The court may have reached the con-

clusion it did because as a matter of state law the only thing it deemed before it was a re-opening of the judgment of foreclosure under § 165 (a), and that that remedy was barred by the statute of limitations. Since the State has power to put a time limit on the re-opening of the judgment of foreclosure under that provision, such action is not a violation of the Fourteenth Amendment. The amended remittitur, thus read, does not preclude a setting aside of the foreclosure deed in a separate proceeding in accordance with § 165 (h) 7, on a recital of circumstances such as those which lead this Court to find a violation of due process.

If this hypothesis was in fact the basis of the judgment of the Court of Appeals, I assume it to be within the power of that court, when the case is returned, to allow full scope to state remedies still open to the petitioner.

No. 533

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IN THE

Supreme Court of the United States

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,
Appellant,

—against—

TOWN OF SOMERS,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee moves to dismiss the appeal on the ground that the appeal does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

Statement of the Case

This in rem foreclosure action was originally instituted on May 8, 1952. The action involved the foreclosure of liens for tax arrears accruing in 1948 with respect to a number of properties in the Town of Somers, one of them being that owned by Nora Brainard. Under Section 165-a of the Tax Law it is mandatory that all properties four years in tax arrears be included in the foreclosure. No parcel may be withdrawn except for one of the reasons specified in the statute (Tax Law, Section 165-i). The present case does not come within any of the exceptions.

Simultaneously with the institution of the action in May 1952, publication was commenced by notice of foreclosure in the Westchester Post and The Record, newspapers serving an area including the Town of Somers. In addition, notice of commencement of the action was given to Nora Brainard by mailing and posting, months prior to the time that she was adjudged to be an incompetent. It is conceded that notice in this case was in strict compliance with the statute.

Four months after the commencement of the action on September 8, 1952, judgment of foreclosure was entered herein with respect to all properties whose owners had failed to redeem them. On October 24, 1952, a deed to the property owned by Nora Brainard was delivered to the Town of Somers and recorded as in the case of other unredeemed properties.

It was not until thereafter, on November 6, 1952, Nora Brainard was admitted to the Harlem Valley Hospital as a person of unsound mind. This was nearly six months after the action had been instituted and almost two months after judgment of foreclosure had been entered. Actually, she was not officially adjudged an incompetent until January 30, 1953, or eight months after the commencement of the action, four months after the entry of the judgment of foreclosure, and three months after the delivery of the deed.

On February 13, 1953, the appellant was appointed and qualified as committee of the recently adjudged incompetent. At that time the committee had more than twenty months within which to bring an action to set aside the deed and to file a notice of pendency of such action in the County Clerk's office, as provided in Section 165-h, subd. 7, of the Tax Law of the State of New York.

Instead of pursuing the statutory remedy by way of action and notice of pendency thereof, the committee made a motion to vacate the judgment of foreclosure and to set

aside the deed, which motion was returnable on October 26, 1953.

On December 3, 1953, the County Court denied the motion and rendered an opinion upholding the constitutionality of the statute in question. In its opinion the County Court also referred to the fact that the procedure adopted by the committee was contrary to the aforementioned statute and specifically directed attention to the appropriate procedure in the following language:

> "In the first instance it should be pointed out that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h, of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceedings were regular and in accordance with the provisions of law, relating hereto, and further provides 'No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *' In the case at bar no action to set aside the deed has been commenced and no lis pendens has been filed although the time that the presumption becomes conclusive has not expired."

Although the committee's time within which to institute an action to set aside the deed and to file a *lis pendens* was not to expire until October 24, 1955, or more than ten months after the County Court's decision. Nevertheless, the committee failed to institute such an action, but appealed to the Appellate Division of the Supreme Court of the State of New York, which affirmed the County Court and held that the statute is in the nature of a statute of limitation and precluded the Court from extending the time to answer or redeem (283 A. D. 883, 129 N. Y. S. 2d 537).

On application of the appellant, the Appellate Division granted leave to appeal to the Court of Appeals, certifying the following question (283 A. D. 1058, 131 N. Y. S. 2d 450):

> "Was the order of the court, entered April 12, 1954, properly made as a matter of law?"

Upon the appeal to the Court of Appeals, pursuant to such leave, the Court unanimously affirmed the order of the Appellate Division and answered the question in the affirmative, without opinion (308 N. Y. 798).

Appellant thereupon moved for reargument or, in the alternative, to amend the remittitur. The motion for reargument was denied and the motion to amend the remittitur granted (308 N. Y. 941).

Appellant thereafter appealed to the Supreme Court of the United States and the case was placed on the Summary Calendar (350 U. S. 882).

The Supreme Court reversed the Court of Appeals and remanded the cause for proceedings not inconsistent with its opinion (351 U. S. 141).

Proceedings after the Remand

After this Court had remanded the case for proceedings not inconsistent with its opinion, the appellant moved before the Court of Appeals to amend the remittitur of the Court or, in the alternative, for a reargument.

The Town of Somers joined in the motion to reargue, stating that the following questions were presented:

> "(a) Was it the intention of the Court of Appeals, in answering the question certified to it by the Appellate Division, to construe Section 165-h, subd. 7 of the Tax Law, as indicated in the opinion of the Supreme Court. In other words, was it the

intention of the Court of Appeals to hold that the statutory procedure by way of an action to set aside a deed and the filing of a lis pendens was not the sole remedy?

"(b) If the answer is that no construction whatever of Section 165-h, subd. 7, was intended by the Court of Appeals—either in answering the certified question or amending the remittitur—does the Court of Appeals construe Section 165-h, subd. 7, to mean that procedure by action and lis pendens is not an exclusive remedy?"

The answer to these questions was of importance, since up to the time of the reargument, the Court of Appeals had not construed this procedural statute (except in its confidential and unpublished report on the first appeal to that Court) and the benefit of its construction was not before the Supreme Court upon the previous appeal. The construction of the subject State statute is solely for the Courts of the State of New York.

Obviously, if the committee persisted in pursuing the wrong remedy (in spite of the judicial admonition as to the proper procedure more than ten months prior to the expiration of the statute of limitation), there could not possibly be a constitutional question presented for determination. As this Court said upon the previous appeal:

> "Manifestly, no constitutional question could have been reached, if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy."

On July 11, 1956, the Court of Appeals granted the appellant's motion to reargue and denied his alternative motion.

On January 10, 1957, the Court of Appeals rendered its decision, wherein it adhered to its original determination

by affirming the order of the Appellate Division and answered the question certified by the Appellate Division in the affirmative.

The Court of Appeals, in its unanimous opinion, construed Section 165-h, subd. 7, as follows:

> "Our holding is simply that where the deed has been delivered and recorded, an attack on the sufficiency of the notice may be made *only in an action* under subdivision 7 of section 165-h of the Tax Law. Here, as we have already pointed out, a committee was appointed and was available and able to institute such an action on behalf of the incompetent well within the statutory period prescribed. Historically there are distinct attributes attached to the word 'action', and the definition of 'action' as opposed to 'motion' is made clear by the language of sections 4 and 113 of our Civil Practice Act. The Legislature of the State of New York has seen fit to provide that an action is the method by which a tax deed may be set aside and it may not be presumed to have acted unreasonably in so doing. Therefore, it cannot be argued that the procedure followed by the committee of the incompetent complied with the statutory mandate of subdivision 7 of section 165-h of the Tax Law, which provides that an action may be maintained to set aside the deed within two years.
>
> "The case of City of New York v. Nelson, 309 N. Y. 94, 127 N. E. 2d 827, affirmed 352 U. S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171, in which we granted leave to appeal and subsequently affirmed, cannot be considered to indicate that the procedure adopted by the committee in the present case, i.e., a motion to open the default in an in rem tax proceeding, was in fact proper. In the present case subdivision 7 of section 165-h of the Tax Law is applicable and provides that an action is the proper remedy, while at the time the application to open the default was made in the Nelson case, supra, the applicable sections of the Administrative Code of the City of New York did not so provide. (But see Local Laws,

1955, No. 63 of the City of New York, amending the Administrative Code of the City of New York so as to insert therein a provision similar to that of subdivision 7 of section 165-h of the Tax Law.)"

Argument on Motion to Dismiss

At this stage of the case, there is involved nothing more than a matter of adjective law concerning the construction of a procedural statute of the State of New York. Accordingly, the present appeal does not come within Title 28, Section 1257(2) of the United States Code.

As above stated, the highest Court of the State of New York has construed the statute as providing the exclusive remedy for vacating a judgment of foreclosure and setting aside a deed. It has held that such remedy is by way of action and the filing of a notice of pendency of such action, and not by way of motion (Tax Law, Sec. 165-h, subd. 7). The Court of Appeals, in its opinion of January 10, 1957, held that under the practice of the State of New York there is a distinct difference between an action and a motion (2 N. Y. 2d 250, citing Sections 4 and 113 of the Civil Practice Act of the State of New York).

The construction of a state statute is solely within the province of the state's courts.

Georgia Railway & Electric Co. v. *Decatur,* 295 U. S. 165, 170;
Schneider Granite Co. v. *Gast Realty Co.,* 245 U. S. 288, 290;
Dorchy v. *State of Kansas,* 264 U. S. 286, 290;
Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 73;
Gatewood v. *North Carolina,* 203 U. S. 531, 541.

In the case of *Georgia Railway & Electric Co.* v. *Decatur,* 295 U. S. 165, the Court said, in connection with

the construction of a state statute by the highest court of that state, at page 170:

> "By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text."

This Court held in *Gatewood* v. *North Carolina,* 203 U. S. 531, at page 541:

> "In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of Section 7, and it is urged that it is the duty of this Court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the Fourteenth Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view."

In the case of *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, it was said, at page 73:

> "Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the Court of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution."

In fact, it has been held by the Supreme Court of the United States that, on a remand to a state court for proceedings not inconsistent with the opinion of the Supreme Court, the state court will be free, so far as its own practice allows, to determine any state questions involved.

Georgia Railway & Electric Co. v. *Decatur,* 297 U. S. 620;
Wilson v. *Cook,* 327 U. S. 474, 489;
Schuylkill Trust Co. v. *Pennsylvania,* 302 U. S. 506, 512.

In the case of *Georgia Railway & Electric Co.* v. *Decatur,* 297 U. S. 620, the Supreme Court previously had decided a case on appeal from the state court involving the question whether a paving assessment against a railway company infringed upon a constitutional right. This Court, in reversing the judgment of the state court against the Railway Company, placed a construction upon the statute which the Supreme Court assumed was in accordance with the construction of the state court. Upon remand for proceedings not inconsistent with the opinion of the Supreme Court, the state court upheld the constitutionality of the paving assessment by placing a different construction on the applicable state statute than had been assumed by the Supreme Court of the United States when reversing the state court on the first appeal. Upon the second appeal, this Court upheld the state court, holding that it was bound to recognize the construction of the state's statute adopted by the highest court of the state.

As was said in *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, at page 512:

> "When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not inconsistent with our opinion. It is clear that the state courts were not precluded from construing the statute so as to eliminate the unconstitutional features."

Thus, in the present case, the Court of Appeals was free to construe the state statute in question and its construction may not be reviewed upon this appeal.

No question has been raised concerning the constitutionality of Section 165-h, subd. 7, of the Tax Law, being the statutory provision construed by the Court of Appeals upon the remand. In any event, it is well settled that the state legislature may legally enact a statute of limitations to prevent the assertion of a right to question the validity of a tax title, *even in the case of jurisdictional defects* in the sale and in the proceedings leading thereto, provided a reasonable time is given for the assertion of the right. A six-months limitation has been held reasonable.

Saranac Land & Timber Co. v. *Comptroller*, 177 U. S. 318;
Halstead v. *Silberstein*, 196 N. Y. 1, 16.

In the case of *Saranac Land & Timber Co.* v. *Comptroller*, 177 U. S. 318, 330, this Court quoted with approval from the case of *Meigs* v. *Roberts*, 162 N. Y. 371, as follows:

> " '* * * This statute, though in some aspects a curative law, is primarily and essentially much more; it is a statute of limitation. It was distinctly held to be such in two decisions of this court (People v. Turner, 117 N. Y. 227; Same v. Same, 145 N. Y. 451, 459) and by the Supreme Court of the United States (Turner v. New York, 168 U. S. 90). A curative act in the ordinary sense of that term is a retrospective law acting on past cases and existing rights. The power of the legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings. * * * But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such statute will bar any right, however high the source from which it may be deduced, pro-

vided that a reasonable time is given a party to enforce his right.'"

The statute of limitation provided for in Section 165-h, subd. 7, of the Tax Law has recently been upheld in the case of *Weaver* v. *The City of Utica,* 2 A. D. 2d, 456, 156 N. Y. S. 2d 569, decided November 14, 1956.

The right to redemption is exclusively statutory and can only be claimed in those cases and under such circumstances as may be prescribed in the statute. Redemption cannot be had in equity, except as it may be permitted by statute, and then only under such conditions as the statute may attach.

Kelley v. *Sanders,* 99 U. S. 441, 445, 446;
Bank of the State of Alabama v. *Dalton,* 9 How. 522;
Levy v. *Newman,* 130 N. Y. 11, 13, 14;
Johnson v. *Smith,* 297 N. Y. 165, 171.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizens have always been regarded as administrative and not judicial in their character. Such proceedings have from necessity been exercised by governments, by summary methods and procedure. These methods were in exercise and existence long before the adoption of the Constitution and have never been supposed to be affected thereby.

McMahon v. *Palmer,* 102 N. Y. 176, 189, aff'd 133 U. S. 660.

At the time when the County Court, in the present action, apprised the incompetent's committee that his remedy was by way of action and the filing of notice of pendency thereof pursuant to the statute, the committee still had more than ten months to comply with the statutory procedure;

and at the time of his appointment he had twenty months to institute the action.

As was said by the Court of Appeals upon reargument in the present case, if the committee could attack the judgment in foreclosure without limit as to time,

> "the state of tax titles and the law of tax foreclosure in New York would be thrown into confusion for lawyers and title companies examining tax titles would never know whether the titles were good or not because they would never know whether some one of the interested parties was a known but unadjudged incompetent."

Since the committee had ample time to bring the appropriate action to vacate the judgment in foreclosure—not only after his appointment but also after having been directly apprised of the proper procedure by the County Court—there is no substantial federal question presented and the judgment rests upon an adequate non-federal basis. Accordingly, this Court is without jurisdiction to entertain the appeal.

Even though a federal question was presented to the Court of Appeals, nevertheless, if that court's decision may be regarded as based upon an independent, adequate non-federal ground broad enough to sustain its judgment, the Supreme Court lacks jurisdiction.

> *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126;
> *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.,* 243 U. S 157, 164-165;
> *Robertson and Kirkham, Jurisdiction of the Supreme Court,* (1951), Sec. 60, page 180.

This conclusion is confirmed by the holding of this Court upon the previous appeal. If the committee's sole remedy is by way of action rather than motion, no constitutional question may be reached.

For the foregoing reasons the appeal should be dismissed.

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